SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No.

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

Petitioner,

vs.

LOUIS VENUTO, Administrator ad Prosequendum and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator ad Prosequendum and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement.

This is an application for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Third Circuit, affirming judgments in the United States District Court for the District of New Jersey.

The Opinion of the Court.

The opinion of the Circuit Court of Appeals for the Third Circuit was filed on March 14th, 1941 (R. p. 1, opinion). It has not as yet been officially published nor does it as yet appear in the advance sheets of the Federal Reporter.

Statement of Grounds of Jurisdiction.

The grounds upon which jurisdiction is invoked have been summarized in the petition.

Statement of the Case.

The statement of the case sufficient to cover the legal points involved has been set forth in the petition for the writ of certiorari.

Specification of Assigned Errors.

POINT I.

The Circuit Court of Appeals erred in holding the defendant, Ross, was liable under Common Law, under the theory of vicarious liability for the negligent acts of Robinson, an admittedly independent contractor.

The Circuit Court of Appeals properly held that in determining the rules of liability arising from the relationship of the parties, the law of New Jersey governs (R. p. 5, opinion). The Circuit Court of Appeals having found that the relationship of master and servant did not exist (R. p. 4,

opinion) but that a relationship of independent contractor and independent contractee did exist between the defendants, it is essential in discussing this case from a common law standpoint of liability to determine what the law of New Jersey is and whether it has been definitely crystallized through judicial determination.

The unquestioned law of New Jersey with reference to liability of an independent contractee for the negligent acts of an independent contractor has been laid down repeatedly by the Court of Errors and Appeals of New Jersey. The rule is that an independent contractee is not liable for the negligent acts of an independent contractor unless the work to be done in the ordinary mode of doing it is a nuisance or is inherently dangerous or the contractee fails to exercise due care in selecting a skillful or proper person as an independent contractor.

In the case of *Cuff* vs. *Newark & New York Railroad Co.*, 35 N. J. Law 17 (1870), the New Jersey Supreme Court held that the rule was firmly established that when the work is in itself not a nuisance and is being done by a contractor exercising independent employment in employing his own servants and the injuries result from the contractor and his servants in the execution, the contractor alone is liable.

In the case of *Reisman* vs. *Public Service Corporation*, Court of Errors and Appeals, 1911, 82 N. J. Law 464, 81 Atl. 838, the plaintiff had been struck and injured by a rocket set off during an exhibition of fireworks at a pleasure resort owned and controlled by the defendant traction company, which as a part of a flat charge conveyed passengers to the park and admitted them. The fireworks were set off under the direction of one Romain, under contract with the defendant, and it was fully proved that Romain and his employees were uncontrolled as to the

manner of doing the work, except that the time and place, when and where the fireworks were to be set off, were fixed by defendant. The arrangements for witnessing the exhibition were controlled by defendant's servants, who kept the spectators at a distance of from three hundred to four hundred feet away from the place of setting off the fireworks, and on the other side of a sheet of water. It was held that Romain was an independent contractor, and that for any negligence of himself or his servants in setting off the rocket, defendant was not responsible. The court, speaking through Parker, J., at page 466 said:

> "As to the negligence, if any, in discharging the rocket, there is no direct proof, and the claim must be based on the maxim res ipsa loquitur. But, as we have already seen, any claim on this score is disclaimed; and if it were not, still it could not avail, because the negligence, if any, was that of an independent contractor. The argument seems to be that notwithstanding the uncontradicted proof showed that Romain was employed as a fireworks expert for a lump sum to set off certain designated fireworks on defendant's property, and was not controlled in any way by defendant or its agents as to the method and details of his work, except the place and time of its performance, and that none of the employes of the defendant had anything to do with setting off the fireworks, and their duties were confined to keeping the crowd back, nevertheless, this co-operation in the management of the entertainment made Romain a servant and not an independent contractor.
>
> "In *26 Cyc. 1546,* an independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. The evidence for the plaintiff brought Romain

> fully within the definition just quoted, and which we deem adequate for the purposes of this case. It follows, therefore, that for any negligence of himself or his own employes in setting off the fireworks, the defendant is not responsible."

The common carrier in this case was carrying out a franchise obligation in conveying its passenger, the plaintiff, to its own amusement park, entertaining him there and then returning him on its own trolley car. We are thus met in that case with a question of continuing relationship between the company and this passenger under its franchise rights. There we had a much stronger case from the plaintiff's viewpoint than the case *sub judice;* and if New Jersey were to recognize the novel theory of "vicarious liability" this is one case where it would certainly have enforced it.

In the case of *Sarno* vs. *Gulf Refining Company,* New Jersey Supreme Court, 1923, 99 N. J. Law 340, 124 Atl. 145; aff. 102 N. J. Law 223, the defendant leased to the owner of a garage in Jersey City a gasoline tank. In March, 1921, the garage owner requested the defendant to remove the tank and pump and the defendant employed for that purpose, one McKillop, a licensed plumber of Jersey City, to perform the work of removal, which the latter undertook to do by sending his workman to the premises for that purpose. The workman excavated the street under a permit from the city, granted to the contractor for the purpose. The infant plaintiff, while the work was progressing, incidentally stepped upon a manhole cover, when an explosion took place beneath him and drew the boy into the burning manhole, where he suffered severe injuries. The court said at page 342:

"The contention of the plaintiff is that the work of removing the tank, under the circumstances, was inherently dangerous and tantamount to the existence of a nuisance, from the effect of which in its dangerous transmission the defendant could not legally absolve itself, by contracting the work out to another, citing *Cuff* v. *Newark and New York R. R. Co.*, 35 N. J. L. 17, and other cases in this and other jurisdictions illustrative of the correctness of that general principle. The difficulty in the application of that conceded rule of law to the case at bar is that we do not find in the case any evidence from which it can be reasonably inferred that the work of removing this tank was per se a nuisance, as was clearly established in such cases as *McAndrews* v. *Collier*, 42 Id. 180. * * *

"The question presented for legal solution in the situation is the legal relationship which existed between McKillop and the defendant in the performance of the work of removal. The rule is established beyond question, by innumerable authorities, that if the legal status of McKillop was that of an independent contractor, he alone and not the defendant is liable for the faulty or negligent execution of the work of removal."

In the case of *Mann* vs. *Max*, Court of Errors and Appeals, 1919, 93 N. J. Law 191, 107 Atl. 417, the owner of land abutting on a public street employed a contractor to build a building thereon. The contractor employed a subcontractor for the mason work, and the latter in prosecution of his work erected scaffolding projecting over the sidewalk against which plaintiff, passing at night, struck his head and was injured. It was held that no liability of the owner was shown, neither the work nor the scaffold being in itself a nuisance, and both being under control of a contractor exercising an independent employment. The court through Parker, J., said at page 193:

"A reasonable and proper scaffold being permissible, it was presumably lawful for the mason con-

tractor to erect one; and a scaffold would not be under the circumstances a nuisance per se, but, as we have said, a legitimate appliance for building purposes. And the rule is thoroughly settled that where one employs a contractor exercising an independent employment and hiring his own servants to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or his servants, unless the employer is in default in selecting an unskillful or an improper person as contractor."

To the same effect are the following cases:

McGuire vs. *Grant,* 25 N. J. Law 356;
Otmer vs. *Perry,* 94 N. J. Law 73;
Giroud vs. *Stryker Transportation Co.,* 104 N. J. Law 424;
Courtinard vs. *Gray Burial & Cremation Co.,* 98 N. J. Law 493;
Busch vs. *Seaboard By-Products Co.,* 100 N. J. Law 304;
Lacombe vs. *Cudahy Packing Co.,* 103 N. J. Law 651;
Gilbert vs. *Junior Trucking Corp.,* 104 N. J. Law 608;
Johnson vs. *American Oil Co.,* 110 N. J. Law 456.

In the instant case there were no allegations or suggestions that Robinson was an improper or unfit person to operate a motor vehicle, nor was there any allegation or proof that the work of Robinson itself was either a nuisance or was inherently dangerous.

In the case of *Wilson* vs. *Brauer,* 97 N. J. Law 482, 117 Atl. 699, the Court of Errors and Appeals of the State of New Jersey in an opinion by Mr. Justice Trenchard stated at page 484:

> "It is true, we believe, that automobiles are not generally held to be dangerous instrumentalities per se. Certainly when carefully and intelligently handled, they are not usually dangerous to other persons using public highways with due care."

It is only where automobiles are handled by improper and incompetent persons that they may become a dangerous instrumentality. Under the New Jersey decisions, therefore, there is no doubt but that Ross under the pleadings, proofs and issue in this case, should have been entitled to a direction of a verdict.

In the case of *Fidelity Union Trust Company* vs. *Field*, 85 L. Ed. 176, the United States Supreme Court held that the Circuit Court of Appeals for the Third Circuit must follow the decisions of the state court of New Jersey and the federal court was not to undertake a determination of a question of state law by its own reasoning.

See also:

Moore vs. *Illinois Central Railroad Co.*, 85 L. Ed. 722; and

Erie R. R. Co. vs. *Tompkins*, 304 U. S. 64; 59 S. Ct. 229, 82 L. Ed. 1188.

In the instant case the Circuit Court of Appeals in affirming the judgment below, decided the question of the defendant Ross's responsibility in direct conflict with the applicable local decisions. It held that there was vicarious liability resting on Ross for the acts of the independent contractor Robinson. In New Jersey a defendant cannot be vicariously liable for the act of another not his agent or servant; his negligence, where the relationship of master and servant does not exist, must be absolute and must either arise from the careless selection of an improper independ-

ent contractor or because of the inherent danger of the work or because the work is a nuisance per se.

See *Courtinard* vs. *Gray Burial and Cremation Co., supra*, at page 496, where the court held:

> "Fundamentally as we have demonstrated in subsequent cases, the theory of master and servant, like that of principal and agent is based upon the legal conception of a representation in a chosen and accepted line of service, by which the employe practically becomes, for that particular duty, the alter ego of the master. It becomes manifest, therefore, that the vicarious responsibility of a third party for injury resulting from a negligent act of another, can be legally or logically supported upon no other recognized conception."

POINT II.

The Circuit Court of Appeals erred in holding that the defendant, Ross, was liable for the negligence of the defendant, Robinson, an independent contractor, where both Ross and Robinson were duly licensed carriers of interstate freight by motor vehicle, by the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1935.

Although the Circuit Court of Appeals held that the basis of the plaintiffs' claim rested on common law responsibility (R. p. 2, opinion), it apparently considered the Motor Carrier Act of 1935 as a statutory authority for enlarging the common law liability of an independent contractee for the acts of his independent contractor (R. p. 5, opinion). It held that "the carriage of freight in high powered motor vehicles on public highways is certainly attended with very considerable risk" (R. pp. 5, 6, opinion) and quoted with approval the rule as stated in the Restatement of Torts, paragraph 428:

> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity" (R. p. 5, opinion).

The Circuit Court of Appeals apparently overlooked the fact that the defendant Robinson, who was the owner and actually operating the truck at the time of the accident, was a duly authorized common carrier (R. p. 64, and Ex. O. 7, p. 178 of Sup. App.), and also overlooked the fact that in New Jersey, as shown above, an automobile is not essentially a dangerous instrumentality. In further support of its opinion, the Circuit Court of Appeals relied upon the authority of *Duncan* vs. *Evans,* 134 Ohio State 486; 17 N. E. (2nd) 913; 20 N. E. (2nd) 729; 60 Oh. App. 265; and *Bates Motor Transp. Lines, Inc.* vs. *Mayer,* 213 Ind. 664; 14 N. E. (2nd) 91.

The case of *Duncan* vs. *Evans, supra,* is not in point. In that case the court relied upon an Ohio statute which expressly covered the situation involved. The court also found in that case that the relationship of independent contractor did not exist. Further, and of great importance, is the fact that in that case the operator of the truck was not authorized and bonded as required by the state law—a different situation than we have in the case *sub judice.*

The *Bates* case is no authority for the rule enunciated by the Circuit Court; in fact, the *Bates* case is to the contrary and supports the position of the petitioner herein, indicating that if the operator of the vehicle had obtained a license under the state act, he would have been an independent contractor, but in the absence of such license, he could not be considered an independent contractor.

The question involving the right of a licensed public carrier to engage as an independent contractor another person also authorized by the Interstate Commerce Commission, has never been passed upon by this court. One of the main purposes of the act is to assure protection to the public against injuries sustained by operation of motor trucks engaged in interstate commerce.

It must be assumed that the defendant, Robinson, by reason of his license by the Interstate Commerce Commission, was possessed of the necessary mechanical knowledge, experience and financial responsibility to perform his work as a common carrier so that the main purpose of the act was fully effectuated, when the defendant, Ross, an authorized common carrier engaged as an independent contractor the defendant, Robinson, also authorized.

In the case of *Sarno* vs. *Gulf Refining Company, supra,* the defendant owner of a garage was held not liable for the negligence of an independent contractee in removing a gasoline tank when an explosion took place injuring the plaintiff. The independent contractor was a plumber licensed by the City of Jersey City and the court said, at page 342:

> "McKillop, the plumber licensed by the city for the purpose, we must assume, was possessed of the necessary reasonable mechanical instrumentalities for the performance of the work, as well as the necessary experience incident to his calling, and was not, in the absence of affirmative proof to the contrary, an improper person to whom to entrust the work of removal. The burden of proving his unfitness, or the impropriety of employing him for the work under the circumstances, was upon the plaintiff, and the case seems to be devoid of such proof."

POINT III.

The Circuit Court erred in affirming the judgments below upon a theory entirely outside of the scope of the pleadings and outside of the issue presented to the jury.

The basis for liability in this case was predicated solely upon the theory that the defendant Robinson was the agent and servant of the defendant Ross and that, therefore, Ross was chargeable under the doctrine of *respondeat superior*. The District Court judge in charging the jury, left it to the jury to decide whether or not the relationship of master and servant existed as between the defendants Ross and Robinson (R. p. 12, appendix to brief of appellant). It further charged as follows:

> "However, if you find that Lewis L. Robinson was an independent contractor, then you should find in favor of Ross and assess damages against Lewis L. Robinson only."

The Circuit Court of Appeals in its opinion held that the lower court was in error in leaving to the jury the question of relationship of master and servant and held that Robinson was an independent contractor (R. p. 4, opinion). In spite of this holding, the Circuit Court of Appeals held that the defendant Ross was liable for the vicarious acts of the independent contractor (R. p. 7, opinion), although this question was utterly beyond the scope of the pleadings and of the issue submitted to the jury.

We respectfully maintain that the Circuit Court of Appeals had no authority to decide *de novo* the case on an issue which was not raised by the pleadings nor submitted to the jury.

In the case of *F. W. Woolworth Co.* vs. *Carriker*, 107 F. (2nd) 689, the Circuit Court of Appeals for the 8th Circuit, 1939, reversed a judgment on the defendant's appeal which had been entered in favor of the plaintiff and remanded the case for a new trial. The plaintiff, a milkman, was injured as a result of falling on some grease on the floor of the defendant's premises. The case was submitted to the jury upon the charges that the defendant had knowledge of the unsafe condition and that it failed to warn the plaintiff of that condition. The trial court withdrew from the jury's consideration the charge that the defendant had negligently permitted grease to remain on the floor. The Circuit Court of Appeals found no evidence to sustain the charges of negligence which was submitted to the jury. The appellee argued that the judgment could be sustained on the charge of negligence which the trial court had withdrawn from the jury's considertaion. Circuit Judge Stone in the court's opinion held as follows:

> "It results from the foregoing that this judgment must be reversed and the case remanded for retrial. Appellee has argued that the court erred in withdrawing the first negligence pleaded, to wit, that the defendant negligently and carelessly 'caused—said grease—to be and remain on the floor' etc. Since the judgment was for appellee he could not have appealed therefrom. Also he cannot support the judgment by the argument that there was sufficient evidence to support a verdict in his favor because this would sustain recovery on a state of facts not only not passed on by the jury but expressly withdrawn from their consideration. In short the first ground of negligence has no place in determining this appeal. We determine the appeal entirely apart from such issue."

So in the instant case the Circuit Court of Appeals should have determined this case solely upon the issue presented to and passed upon by the jury and should have excluded any liability predicated upon the theory of independent contractor.

Conclusion.

From the foregoing reasons, it is respectfully submitted that a writ of certiorari should be allowed according to the prayer in the petition.

Respectfully submitted,

CHARLES A. ROONEY,

Attorney for Ross Motor Lines, Inc.,

Petitioner.

SAUL NEMSER,

Of Counsel.